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COMMISSION ON HUMAN RIGHTS
Intersessional open-ended Working Group to elaborate
a draft legally binding normative instrument for the
protection of all persons from enforced disappearance
Geneva, 6-17 January 2003

DRAFT REPORT

VI. DISCUSSION ON SUBSTANTIVE PROVISIONS (continued)

C. Protection against impunity

1. Several speakers asked whether it was possible to include a general clause requiring States to take the necessary steps to combat impunity. In the view of the other participants, it was preferable to indicate clearly in the future instrument the various measures that should be taken in that regard, in order to set out States' obligations clearly.

1. Statute of limitations

2. Emphasis was placed on the non-applicability of statutory limitations to forced disappearances that constituted crimes against humanity.

3. In the case of forced disappearances that did not constitute crimes against humanity, most speakers considered that, in view of the continuing nature of the offence, the limitation period should begin from the moment when the case was clarified. However, some participants considered that the period should run from the moment of commission of the offence. Another delegation considered that, in the case of persons who had revealed their participation in committing the offence, the period should begin from the moment of the confession.

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4. Most of the participants considered that the length of the limitation period should be the longest of those provided for in domestic law. In the view of one delegation, such an approach could be adopted only if forced disappearances were regarded as separate offences in domestic law.

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5. The need to allow for the possibility of suspending limitation periods, in cases where effective remedies were rendered impossible by the situation in the country, was raised.

2. Immunity and special courts

6. The question was raised of whether the future instrument should ban special courts, especially military courts, from trying cases of forced disappearance. For some delegations, special courts could be useful in speedily resolving cases in certain circumstances, or were acceptable as long as they remained impartial and respected the principles of the right to a fair trial. However, several speakers pointed out that international law was tending increasingly to rule out the use of such courts to try serious violations of human rights. It was underlined that the use of military courts very often led to situations of impunity.

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7. The 1992 Declaration and the 1998 draft provided that no privileges, immunities or special exemptions should be admitted in trials of persons responsible for forced disappearances. However, some delegations considered that exceptions should be allowed for perpetrators who agreed to reveal information of use in establishing the truth. One delegation considered that other grounds for plea bargaining available in domestic law might also be used. Several participants considered that plea bargaining should not lead to complete exoneration from responsibility. Lastly, it was noted that some legal systems allowed agreements to be reached between perpetrators and victims. One delegation considered that the future instrument should stipulate that no privileges, immunities or exemptions would be allowed except insofar as they were in keeping with its aim and purpose, and without prejudice to the privileges, immunities or exemptions recognized in international law, including the Vienna Convention on Diplomatic Relations.

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3. Asylum

8. Several delegations emphasized the need to link the obligation not to grant asylum or shelter to persons suspected of participation in a forced disappearance with the obligation not to return (*refouler*) such persons to a State where they would run the risk of being subjected to serious human rights violations. It was pointed out that the draft Convention included such a guarantee. However, some delegations considered that the obligation not to return (*refouler*)

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contained in article 15, paragraph 1 of the draft Convention should be limited to cases where there was a risk of enforced disappearance. The risk of grave violations of human rights was considered too large. HCR presented to the working group the exclusion clause contained in article 1F of the 1951 Geneva Convention relating to the Status of Refugees.

9. Some speakers considered that it was difficult to provide for a total ban on the granting of asylum to persons responsible for forced disappearances, particularly in the case of those who agreed to reveal information of use in establishing the truth.

4. Amnesty and pardons

10. Some delegations considered that, instead of banning amnesty for those responsible for forced disappearances, as in the 1998 draft, States should be recommended to take into consideration the extreme seriousness of acts leading to forced disappearances. Several participants said that they were not opposed to amnesty in cases of forced disappearance which did not constitute crimes against humanity. Others, however, considered that before amnesty was granted, a number of conditions must be fulfilled: an inquiry leading to the establishment of the truth; adequate compensation for the victims; and sanctions against the perpetrators.

5. Other grounds for exemption from criminal responsibility, mitigation and aggravation

11. Some delegations considered that it should not be possible for orders from a superior to constitute a ground for exemption from responsibility, nor a mitigating circumstance, either in peacetime or in wartime. Several participants considered that the responsibility of the superior should be established, independently of the subjective element referred to in article 9, paragraph 3 of the draft Convention.

12. One delegation considered that mitigating circumstances might be accepted, but that they should be more strictly defined than in article 5, paragraph 2 of the draft Convention.

13. Some participants considered that severer penalties should be applicable when the victims were vulnerable persons (the disabled, the elderly, pregnant women, children etc.).

14. The Chairperson summed up the discussions as follows:

- It had to be decided whether the instrument should contain a general obligation or more specific protection measures against impunity;

- [REDACTED]
- There was a strong convergence of views that there should be no statute of limitations on forced disappearances which constituted crimes against humanity. Where differences under the ordinary law were concerned, it seemed no one disputed that the longest limitation period stipulated in domestic law should be applied. There remained the question of the point when the limitation period should begin; The Working Group considered that immunity should be restricted to the maximum possible extent. However, the issue of immunities which were based on international law should be [REDACTED] means of applying immunities which were based on domestic law; [REDACTED]
 - Amnesty and pardons should not have the result of preventing fair material compensation and non-pecuniary damages;
 - The use of special courts, especially military courts, prompted much concern;
 - In the matter of the granting of asylum or shelter to persons suspected of forced disappearances, the Working Group's goal should be to eliminate sanctuaries which could be exploited by those responsible for forced disappearances;
 - Several delegations raised the question of measures to be taken in respect of persons who had cooperated with the judicial authorities. That covered both the issue of immunity or reduced sentences and that of territorial asylum;
 - It was suggested that the future instrument should set forth a form of "duty to disobey" orders and instructions relating to forced disappearances.
- [REDACTED]